87 - 1147

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VILLAGE OF NEW LENOX,
an Illinois Municipal Corporation,

Petitioner,

v.

UNION NATIONAL BANK AND TRUST COMPANY OF JOLIET, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963, and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS THIRD JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1. Whether Respondents' claim that Petitioner's zoning ordinance was unconstitutional is ripe for decision by the courts.
2. Whether Petitioner's zoning ordinance is unconstitutionally vague under the Fourteenth Amendment.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, VILLAGE OF NEW LENOX, an Illinois Municipal Corporation, and Respondents, UNION NATIONAL BANK AND TRUST COMPANY OF JOLIET, as Trustee dated August 10, 1970, and known as Trust No. 963, and FERRO BROTHERS PARTNERSHIP, an Illinois General Partnership.

Also, parties to the proceedings below were JOHN A. NOWAKOWSKI, SHIRLEY M. NOWAKOWSKI, MARTHA ANN PARDUHN, HENRY CIALDELLA, TERRY TER HAAR, NANCY TER HAAR, CHARLES CROCKER, and ARLENE CROCKER, who were Intervenors aligned with the VILLAGE OF NEW LENOX, as defendants in opposing the special use permit and development proposed by Respondents.

Union National Bank of Joliet has, since the pendency of this litigation, merged into First Midwest Bank/Illinois. However, the trust agreement remains the same and is now known as Union National Bank and Trust Company of Joliet, now known as First Midwest Bank/Illinois, as Trustee under Trust Agreement dated August 10, 1970, and known as Trust No. 963.

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OPINIONS BELOW

The decision of the Appellate Court of Illinois, Third Judicial District, is reported at 152 Ill. App. 3d 919, 505 N.E.2d 255, 105 Ill. Dec. 875 (3rd Dist. 1987), and is set out in the Appendix at A-1. The order denying a petition for rehearing is set forth in the Appendix at B-1. The order of the Supreme Court of Illinois denying leave

to appeal is set out in the Appendix at C-1. The trial court's final judgment order, after trial on counts one, two and three of Respondents' complaint, is set out in the Appendix at D-1. The trial court's order which granted Petitioner's motion for summary judgment on Count IV and denied Respondents' motion for summary judgment, from a docket entry on the Judge's Docket, is set out in the Appendix at E-1.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3). The judgment of the Appellate Court of Illinois was entered on January 28, 1987, and is set forth in the Appendix at A-1. The order of the Supreme Court of Illinois denying leave to appeal was entered on October 7, 1987, and is set out in the Appendix at B-1.

CONSTITUTIONAL PROVISION

The United States Constitution, Fourteenth Amendment, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORDINANCE PROVISION

The Municipal Code of New Lenox, Illinois, 1981. Pertinent portions of the challenged zoning ordinance are cited verbatim in Appendix L.

STATEMENT OF THE CASE

This case stems from Petitioner's denial of a special use permit application by Respondents. After public hearings and a recommendation for denial of the application from the New Lenox Plan Commission the Petitioner's legislative body, the board of trustees, denied the Respondents' application.

Respondents own certain real estate within Petitioner's municipal boundaries. This real estate is zoned I-1 Limited Industrial District by the zoning ordinance found in Petitioner's municipal code. App. L. Pursuant to the zoning ordinance industrial uses in the I-1 district must be conducted wholly within enclosed buildings.

On July 12, 1984, Respondents filed a special use application with Petitioner for the purpose of constructing and operating an asphalt plant on the property located in the I-1 district. Pursuant to the procedures set forth in Petitioner's zoning ordinance various public hearings on the application were held before the New Lenox Plan Commission. The New Lenox Plan Commission made its recommendation to the board of trustees that Respondents' special use application be denied. Subsequently, on January 16, 1985 the board of trustees denied the application.

On February 19, 1985, Respondents filed a three count complaint seeking an injunction against enforcement of the zoning ordinance on the subject property for the proposed asphalt plant. App. F. The allegations in the complaint centered around the denial of the special use application, attacked the board of trustees' action as being arbitrary and capricious and further attacked the provisions as being unconstitutional as applied. Subsequently, Respondents amended the complaint by adding Count IV. App. G. The allegations contained in this count relate to an alleged refusal by the Petitioner and its building commissioner to issue a building permit for the construction and operation of an asphalt plant. App. G-3. This new count also alleged a special use permit application was made to and denied by Petitioner. App. G-3. Count IV further alleged the zoning ordinance was unconstitutionally vague and was an unlawful delegation of legislative power to the building commissioner. App. G-6.

Respondents filed a motion for summary judgment as to Count IV only on October 8, 1985. This motion specifically alleged the denial of a building permit by Petitioner's building commissioner "on or about July 12, 1984". App. I-2. After Petitioner filed its response to the motion (App. K) and its own motion for summary judgment (App. J), and arguments on the matter were heard, the trial court denied Respondents' motion and granted Petitioner's motion. App. E.

A two week trial was held on the remaining three counts. On January 7, 1986, the trial court rendered its judgment order. App. D.

HOW THE FEDERAL QUESTION WAS PRESENTED

After the trial court's final judgment order was entered, Petitioner appealed the verdict on Counts I through III to the Appellate Court of Illinois, Third District. At that time, Respondents also cross-appealed the denial of their motion for summary judgment by the trial court.

Rather than decide the case on the merits of the two week trial the Appellate Court of Illinois, Third District decided that Respondents were entitled to summary judgment on the constitutional issue raised in Count IV. App. A. In so doing the lower court noted "[c]ount IV of the plaintiffs' [Respondents herein] complaint attacked the constitutionality of the village's zoning ordinance as it applies to the plaintiffs' property." App. A-3. The Appellate Court of Illinois, Third District held the ordinance to be unconstitutionally vague. The basis of the holding was that an ordinary person exercising ordinary common sense would have to guess at the ordinance's meaning and that the ordinance unconstitutionally delegated legislative power to the village board of trustees.

Nowhere in its decision did the Appellate Court of Illinois, Third District, address the issues raised in Petitioner's response and own motion for summary judgment that no building permit application was ever filed with Petitioner by Respondents and that Respondents failed to exhaust the available administrative remedies in the zoning ordinance. Furthermore, the Appellate Court of Illinois, Third District, misapplied the relevant case law cited from *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973). The lower court also ignored the argument that the building commissioner was not dele-

gated the unfettered power to determine permitted uses under the zoning provisions for the I-1 district. Instead the court held Petitioner's legislative body, the village board of trustees, was improperly delegated that power.

Thus, Respondents' arguments made under the guise of constitutional protection through the Fourteenth Amendment were not only decided in a vacuum, but misread and misapplied by the Appellate Court of Illinois, Third District.

REASONS FOR GRANTING THE WRIT

I.

RESPONDENTS' CONSTITUTIONAL CLAIMS, AS DECIDED BY THE APPELLATE COURT OF ILLINOIS, ARE NOT RIPE FOR DECISION.

The Appellate Court of Illinois, Third District's opinion that Petitioner's zoning ordinance is unconstitutionally vague failed to determine whether or not Respondents presented an issue ripe for decision by the courts. This Court has steadfastly refused to address claims not yet ripe. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), on remand, 779 F.2d 50 (6th Cir. 1985); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). The rationale for this requirement is to enable the Court to determine the effect of the regulations after the government decision makers have interpreted them.

In Count IV of their complaint Respondents claim that a building permit application was denied by the building

commissioner. App. G-3. Assuming, for the sake of argument, that this allegation was true Respondents failed to appeal that denial as provided for in the zoning ordinance at section 10-12-4(C) (App. L-18) and section 10-12-7(B) (App. L-20). A decision by the zoning board of appeals, rendered after a hearing, is a final administrative determination which is subject to judicial review pursuant to the Illinois Administrative Review Law (Ill. Rev. Stat. 1985, ch. 110, par. 3-101 *et seq.*). App. L-20 - L-21; App. M. There is no allegation, let alone any evidence, that Respondents followed the remedial procedures available through the statutory procedures of the State of Illinois and Petitioner's zoning ordinance. Petitioner's response to Respondents' motion for summary judgment and its own motion for summary judgment make this very clear. App. J; App. K. Also, Petitioner's answer to Count IV denied any building permit application was ever made. App. H.

Nonetheless, Respondents never refuted this point in their motion for summary judgment before the trial court and the Appellate Court of Illinois, Third District never addressed this point. This case cannot be considered a general constitutional challenge to the validity of Petitioner's I-1 zoning provisions as was the case in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The lower court did not consider Respondents' claim to be a general constitutional challenge stating that Respondents attacked the zoning ordinance "as it applies" to the property. App. A-3. A review of the ordinance provisions in question shows that it does not generally exclude all "industrial establishments" as was the case in *Euclid*, 272 U.S. at 388, 47 S.Ct. at 118. Further, review of Respondents' pleadings in the trial court makes it clear that the cause of action is predicated upon, and is a challenge of, the alleged vague-

ness of the I-1 zoning provisions as applied to the property upon which construction and operation of an asphalt plant is proposed.

In rendering its opinion that Petitioner's zoning ordinance was unconstitutionally vague, the Appellate Court of Illinois violated an important rule of constitutional construction. That is, never to anticipate a question of constitutional law in advance of the necessity of deciding it. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Immigration*, 113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899 (1885). In this case, the constitutional issue was not ripe for review and the lower court erred when it did so.

II.

THE APPELLATE COURT OF ILLINOIS' DECISION THAT PETITIONER'S ORDINANCE IS UNCONSTITUTIONALLY VAGUE IS CONTRARY TO THE DECISIONS OF THIS COURT.

The Appellate Court of Illinois, Third District relied on *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 413 L.Ed.2d 830 (1973), in stating that "[a]n ordinance is unconstitutionally vague when men of common intelligence must necessarily guess at its meaning." App. A-5. In so doing the lower court indicated that an "ordinary person exercising ordinary common sense" would have to guess whether an asphalt plant is a permitted use, special use or prohibited use under the applicable zoning ordinance. App. A-5.

Any statute or ordinance which prescribes certain conduct must be sufficiently definite to "give a person of ordinary intelligence fair notice that his contemplated con-

duct is forbidden by the statute." *Stansberry v. Holmes*, 613 F.2d 1285 (5th Cir. 1980), citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1971). As this Court noted in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1971), mathematical certainty is not expected from an ordinance, it need only give fair warning of the conduct prescribed in light of common understanding. 408 U.S. at 110, 92 S.Ct. at 2300.

When analyzed in the context of this Court's pronouncements, and those found elsewhere, it is clear that Petitioner's zoning ordinance is not unconstitutionally vague as applied to Respondents' property and proposed use. Contrary to the Appellate Court of Illinois, Third District's assertion, a person of ordinary intelligence can easily determine what conduct is needed in relation to Respondents' proposal and what category an asphalt plant falls in. As with the zoning resolutions in *Rumpke Waste, Inc. v. Henderson*, 591 F.Supp. 521 (S.D. Ohio 1984), the zoning provisions in this case "by their very nature, put persons on notice that there are restrictions on the uses to which land can be put." 591 F. Supp. at 529.

The lower court erred in its analysis and appeared to be dictating mathematical precision when it noted that the lists of uses in the I-1 provision were "not comprehensive" and were "incomplete." By looking at section 10-6-2-2(A)(1) (App. L-2) a person of ordinary intelligence can see that permitted industrial uses must be of the types of activities ("such as") listed. Furthermore, the types of permitted industrial uses are "not limited to" the activities listed in that section. The salient proviso in section 10-6-2-2(A)(1) is that the permitted industrial types of activities, both listed and "such as" those listed, must "be conducted wholly within enclosed buildings." App. L-2.

Thus, if an industrial activity cannot be conducted wholly within an enclosed building it is not a permitted use under section 10-6-2-2(A)(1). This reasoning would apply to Respondents' proposed asphalt plant use.

The zoning provisions at issue provide for special uses that are similar and compatible to the permitted uses. App. L-4. Since an asphalt plant involves an industrial type activity with manufacturing, processing and storage of material, all listed activities, a person of ordinary intelligence could determine that such a use might be similar and compatible to the permitted uses with the exception that it is not conducted wholly within enclosed buildings. If an asphalt plant use was authorized by a special use permit it would not fall within the prohibited uses as stated in section 10-6-2-6. App. L-6. These zoning restrictions are considered in the context of the general purpose stated in section 10-6-1 (App. L-1) and description of the I-1 district in section 10-6-2-1 (App. L-1). Given this context the ordinance gives "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford*, 408 U.S. at 113, 92 S.Ct. at 2301, citing *American Communication Assn. v. Douds*, 339 U.S. 392, 412, 70 S.Ct. 674, 691, 94 L.Ed.2d 925 (1950).

Statutes and ordinances should not be automatically invalidated, as the lower court did here, simply because there may arguably be some difficulty in determining whether certain conduct or activities fall within their language. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963). A business person of ordinary intelligence, such as Respondents, should know what activities are encompassed by an ordinance as a "matter of ordinary commercial knowledge or by making a reasonable investigation" (*McGowan v. Mary-*

land, 366 U.S. 420, 428, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961)) or by resort to an administrative process (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982)). In the case at bar Respondents exercised their "commercial knowledge" and applied for a special use permit pursuant to Petitioner's zoning ordinance.

Certainly, in this case it cannot be denied the ordinance did not provide "fair notice" to Respondents. Respondents' pleadings in Counts I, II and III show clearly they were able to determine what was needed to place an asphalt plant on their property (see, App. F), applied for a special use permit and participated in public hearings on the application. This was conducted pursuant to the procedures set forth in the ordinance at section 10-12-8 (see, App. L-21).

It is clear that the ordinance in question provides an opportunity to know what is prohibited so that a person may "steer between the lawful and unlawful." *Grayned v. City of Rockford*, 408 U.S. at 109, 92 S.Ct. at 2298. To avoid arbitrary and discriminatory enforcement, laws must provide explicit standards for those who are delegated to apply them. 408 U.S. at 109-110, 92 S.Ct. at 2299. In Illinois zoning is considered to be primarily a legislative function. *Cosmopolitan National Bank v. County of Cook*, 103 Ill. 2d 302, 469 N.E.2d 183, 82 Ill. Dec. 649 (1984); *LaSalle National Bank v. County of Lake*, 27 Ill. App. 3d 10, 325 N.E.2d 105 (2nd Dist. 1975). Thus, in the context of this case Petitioner's board of trustees is vested with the power to grant or deny a special use permit application. App. L-16. The standards followed by the board of trustees are found in the I-1 provisions and in section 10-12-8 (App. L-21 - L-24). There is no delegation of this

authority to any municipal officer and thus, no unlawful delegation of legislative power.

The Appellate Court of Illinois has required mathematical precision when it states that certain lists of uses in the ordinance are not "comprehensive" or are "incomplete." Zoning is the predominant technique by which municipal governments can exercise some control over private property. *Stansberry v. Holmes*, 613 F.2d at 1288. This Court has long noted that land use regulations promote "values [which] are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed.2d 27 (1954). The lower court's opinion has eroded the flexibility with which the legislative bodies of local municipalities may act in zoning matters. Precision in listing permitted and prohibited uses will destroy the ability of those bodies to promote the general welfare of the public through land use regulations. The nature of the special use technique in these regulations necessitates that an independent determination be made that a proposed use will be compatible with the surrounding area.

Even if the ordinance were construed so as to completely prohibit a use such as an asphalt plant this would not, of itself, render the ordinance unconstitutional. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). This Court should reject the lower court's decision which casts a cloud on the ability of all local municipalities to implement zoning regulations in a constitutionally acceptable manner.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Third District.

Respectfully submitted,

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